NADARAJAN SUBRAMANIAM

v.

AMERICAN INTERNATIONAL ASSURANCE CO LTD

HIGH COURT MALAYA, KUALA LUMPUR
HARMINDAR SINGH DHALIWAL JC
[CIVIL SUIT NO: S4-22-04-2001]
15 NOVEMBER 2010

EVIDENCE: *Weight - Testimony of expert - Cause of death of insured - Testimony given by physician - Discrepancy in physician's statement as to cause of death - Physician unable to provide reasonable explanation - Post mortem report signed by him - Post mortem examination conducted by another party - Whether evidence was reliable and safe to be acted upon*

INSURANCE: *Accident insurance - Repudiation - Insured died from intracerebral hemorrhage - Plaintiff claiming as nominee to three insurance policies - Defendant did not receive nomination forms save for one - Whether defendant could claim plaintiff was not the nominee - Insured dealt with defendant's agent - Whether knowledge of defendant's agent deemed to be knowledge of defendant - Section 151(1) Insurance Act 1996 - Plaintiff failed to disclose full extent of deceased's earnings - Whether this was material non-disclosure - Whether cause of death due to illness or accident - Whether plaintiff able to prove insured's death was due to accident*

INSURANCE: *Agents - Insured dealt with defendant's agent - Whether agent's knowledge could be deemed as knowledge of defendant - Insurance Act 1996, s. 151(1)*

The plaintiff brought this claim against the defendant, a licensed insurer, as nominee of three accident policies. The insured, one Tholan Iyasamy (deceased), died from intracerebral hemorrhage. The defendant submitted that it only received one nomination form and conceded the plaintiff was the nominee for that insurance policy. However, it contended that since it did not receive the other two nomination forms, the plaintiff could not claim as a nominee for the said policies. The plaintiff on his part was able to produce the said nomination forms signed by the deceased. The defendant also repudiated liability on the basis that the plaintiff had failed to disclose the total amount of the

A deceased's earnings and this amounted to a material non-disclosure. The defendant further contended that the plaintiff was not entitled to claim for the insurance benefits as the cause of death was a result of an illness and not an accident. The defendant relied on the testimony of Dr. Mohd Yassin ('DW1'),
B who signed the post mortem report and prepared the physician's statement. He testified that the underlying cause of intracerebral hemorrhage was hypertension. The deceased was found by PW3, his childhood friend, who testified that he saw the deceased on the bathroom floor holding his head in pain shortly before he died.
C Three months prior to his death, the deceased was treated by Dr Kanaparajan ('PW2'). PW2 did not find any illness on the deceased. He testified that he would have noted in his report if the deceased had any form illness or hypertension. The issues to be determined were: (i) whether the plaintiff was the nominee of
D the three insurance policies; (ii) whether there was material non-disclosure on the part of the plaintiff; and (iii) whether the cause of death was due to an accident or an illness.

Held (allowing plaintiff's claim):

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(1) The nomination forms for the two insurance policies were indeed signed by the deceased. There was evidence that the deceased was dealing with the defendant's agent and the forms were submitted to him. It was the duty of the agent to
F bring the said forms to his principal. By virtue of s. 151(1) Insurance Act 1996, the knowledge of the agent shall be deemed to be the knowledge of the licensed insurer. The defendant's contention, that it did not receive the nomination forms, had no merit. (paras 9 & 13)

G **(2)** The amount that the deceased was earning was not an issue. Since the issue was in regard to accident policy, the fact that there was discrepancy in the deceased's earnings was not relevant; the issue to be addressed was the nature of the deceased's employment. The defendant would not been
H prepared to insure the deceased if he was employed in a high risk job that was accident prone, however this was not the case here. Therefore, the fact that the plaintiff did not disclose the full extent of the deceased's income was not considered as a material non-disclosure. (para 18)

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(3) The plaintiff had to prove that the death of the deceased was due to a risk that was insured by the policy. Therefore, the plaintiff had to show that the death of the deceased was an accident, *ie*, a fall. The testimony of PW3 coupled with the evidence which suggested that the deceased would not have been suffering from any illness or hypertension at the time of death was more than sufficient to prove that the deceased had a fall. (paras 27-29 & 31)

(4) The testimony given by DW1 carried little weight or persuasive value. DW1 was not the one who conducted the post mortem examination and there were discrepancies in his physician's statement to the defendant, for which he was not able to give an explanation. Therefore, the evidence given by DW1 was unreliable and unsafe to be acted upon. (para 32)

Case(s) referred to:

Amanah Raya Bhd v. Jerneh Insurance Bhd [2005] 2 CLJ 393 CA ***(refd)***

Azizah Abdullah v. Arab-Malaysian Eagles Sdn Bhd [1996] 2 BLJ 128 HC ***(refd)***

Goh Chooi Leong v. Public Life Assurance Co Ltd [1963] 1 LNS 30 HC ***(refd)***

Leong Kum Whay v. QBE Insurance (M) Sdn Bhd & Ors [2006] 1 CLJ 1 CA ***(refd)***

Leong Luen Kiew & Anor v. The New Zealand Insurance Co Ltd [1939] 1 LNS 50 HC ***(refd)***

Newsholme Bros v. Road Transport and General Insurance Co Ltd [1929] 2 KB 356 ***(refd)***

Poh Siew Cheng v. American International Assurance Co Ltd [2005] 1 LNS 252 HC ***(refd)***

Regina Fur Company Ltd v. Bossom [1958] Lloyd's Law Reports 425 ***(refd)***

The "Melanie" United Oriental Assurance Sdn Bhd Kuantan v. WM Mazzarol [1984] 1 LNS 41 FC ***(refd)***

Thompson v. London, Midland and Scottish Railway & Co [1930] 1 KB 41 ***(refd)***

Watts v. Simmons [1924] 18 Lloyd's Law Reports 177 ***(refd)***

Legislation referred to:

Insurance Act 1996, ss. 151(1), 165(1)

For the plaintiff - Sangeet Kaur Deo (Karpal Singh with her); M/s Karpal Singh & Co

For the defendant - Andrew Khoo; M/s Khoo & Sidhu

Reported by Melinda Robert

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JUDGMENT

Harmindar Singh Dhaliwal JC:

[1] One Tholan a/l Iyasamy ("deceased") died on 29 August 1999. He was 62 years old. At the time of his death, three separate personal accident policies had been issued by the defendant to the deceased. The plaintiff claims that he was the nominee of the said insurance policies. He made a claim with the defendant. This claim was rejected. Hence this suit.

[2] Several reasons were given by the defendant for the repudiation of the claim which reasons have now become the issues to be resolved in this action. The reasons or issues are as follows:

1. Whether the plaintiff was the nominee for all three policies;
2. Whether there was a material non disclosure by the deceased; and
3. Whether the death of the deceased was due to an accident, which was a risk covered under the said policies, or if it was due to an illness for which the claim will then become non-payable.

Whether The Plaintiff Was The Nominees For All The Policies

[3] It was not disputed that three policies were issued to the deceased as follows:

1. No. P738782551 ("Policy 1")
2. No. P738782564 ("Policy 2")
3. No. P738782522 ("Policy 3")

[4] The total sum insured under these policies was RM430,000. A notable feature, and which will be alluded to in a moment, was that all the three policies were issued on 3 June 1998. The defendant conceded that the plaintiff was the nominee for Policy 3 but claimed that they did not receive any nomination forms for the other two policies. This was in spite of the fact that the plaintiff was able to produce two nomination forms signed by the deceased for Policy 1 and Policy 2.

[5] Now it was not disputed by the defendant that the nomination forms in question for Policy 1 and 2, as produced by the plaintiff, were that of the defendant company. It was also conceded that the nomination forms were signed by the deceased. Their only contention was that from their records, the nomination forms were not handed over to the defendant.

[6] In this regard, there was, however, evidence that the deceased was dealing with an agent of the defendant company, one V. Shanmugabalan. The agent's name was stated in the said nomination forms. The defendant did not appear to quarrel with the fact that he was indeed their agent.

[7] What is noteworthy and peculiar as well is that whilst all these policies were issued at the same time, the defendant had records of only one nomination form. The defendant's witness, DW2, conceded that this was unusual. It was also the practice in the industry that the agents would handle all such matters such as filling up of the nomination forms and handing them over to their principal.

[8] In this regard, ss. 165(1) and 151(1) of the Insurance Act 1996 ("the said Act") are relevant. Section 165(1) of the said Act reads:

> Subject to subsection (2), where a policy owner dies having made a nomination, the licensed insurer shall pay the policy moneys of the deceased policy owner according to the direction of the nomination upon receipt of a claim by the nominee and the claim is accompanied by proof of death of the policy owner.

[9] Section 151(1) of the said Act reads:

> A person who is authorized by a licensed insurer to be its insurance agent and who solicits or negotiates a contract of insurance in that capacity shall be deemed, for the purpose of the formation of the contract of insurance, to be the agent of the licensed insurer and the knowledge of that insurance agent shall be deemed to be the knowledge of the licensed insurer.

[10] In this regard as well, the Federal Court in *The "Melanie" United Oriental Assurance Sdn Bhd Kuantan v. W.M. Mazzarol* [1984] 1 LNS 41; [1984] 1 MLJ 260 at 262 held:

A It is settled law that where an agent is authorized to negotiate and settle terms of a proposal or delegated with a duty to investigate certain matters, the agent's knowledge is also the knowledge of the insurance company. *Bawden v. The London, Edinburgh and Glasgow Assurance Co* [1892] 2 QB 53; *Ayrey v. British Legal and United Provident Assurance Co. Ltd* [1918] 1 KB 136 and *Evans v. Employers Mutual Insurance Association Ltd* [1936] 1 KB 505).

[11] I should clarify that the position at common law was for a while quite different from what I have set out earlier. The position was that where an insurer's agent assisted the insured in filling out the necessary forms, he or she was regarded as an agent of the insured and not the insurer (see *Newsholme Bros v. Road Transport and General Insurance Co Ltd* [1929] 2 KB 356; *Thompson v. London, Midland and Scottish Rail & Co.* [1930] 1 KB 41).

[12] Thankfully, this position no longer prevails as it was inclined to produce unjust consequences (as observed by Gopal Sri Ram JCA (as he then was) in *Leong Kum Whay v. QBE Insurance (M) Sdn Bhd & Ors* [2006] 1 CLJ 1 at 23). The way in which the legal position in this regard has evolved is well documented in the judgment of Abdul Malik Ishak J (as he then was) in *Poh Siew Cheng v. American International Assurance Co. Ltd* [2005] 1 LNS 252.

[13] Given the current position that obtains under the law, the defendant cannot now assert that the claim is not payable on this ground. There can be little doubt that the nomination forms for Policy 1 & 2 were indeed signed by the deceased and it was the duty of the agent to then bring the said forms to his principal. Perhaps he did just that as it was rather unusual, as conceded even by the defendant, that they received one of the nomination forms but not the other two for policies that were issued on the same day. For these reasons, the defendant's contentions on this issue have no merit.

Was There Material Non-disclosure?

[14] The defendant is also repudiating liability and refusing to pay on the ground that there had been a material non-disclosure by the plaintiff. In the application forms for the said policies, it was stated that the deceased was self-employed, selling and buying oil palm bunches and earning an estimated RM150,000 per year. Now the defendant was able to produce a letter from the

deceased's former employer, Golden Hope Plantations, which asserted that the deceased was a general worker having a last drawn monthly salary of RM290.

[15] As against this was evidence that after the deceased had left his former employer, Golden Hope Plantations, the plaintiff and the deceased were jointly earning RM100,000 per annum by buying and selling palm oil bunches. The defendant nevertheless still contends that there has been misrepresentation and material non-disclosure of the deceased's occupation and incomes.

[16] In this regard, it is trite that the onus to prove such material non-disclosure is on the defendant (see *Goh Chooi Leong v. Public Life Assurance Co. Ltd* [1963] 1 LNS 30; *Azizah Abdullah v. Arab-Malaysian Eagles Sdn Bhd* [1996] 2 BLJ 128).

[17] From the evidence adduced at the trial, there was a discrepancy as to the amount of income earned but not the nature of the occupations. It appears from the testimony of the plaintiff that the deceased could only have been earning about RM50,000 yearly. Now is this sufficient for the defendant to repudiate liability on this ground?

[18] With respect, I do not think so. These were accident policies. It would not matter to the defendant if he was earning RM50,000 or RM150,000 yearly. What would matter would be the nature of his employment. If he was, for example, employed in a high risk job where accidents were extremely likely, then disclosure of such becomes material as the defendant would not be prepared to insure such a risk. But that was not the case here. So in the instant case, the defendant would only be concerned with whether the deceased was able to make the payments for the premiums. It would seem extremely unjust if the defendant was allowed to repudiate liability on this ground. I would therefore hold that there was no such material non-disclosure in this case as would entitle the defendant to repudiate liability.

Whether The Death Of The Deceased Was Due To An Accident Or Due To An Illness

[19] It was common ground that all three policies contained coverage for "accident deaths". The relevant clause here appears in Part 1, Section 1 of the said policies as follows:

A When the Assured shall obtain bodily injury effected directly and independently of all other causes by accident (hereinafter referred to as "injury"), which results in loss of life of the Assured within three hundred and sixty-five (365) days after the date of the accident, the company will pay the Accidental Death Benefit (AD).

B **[20]** What was revealed through the evidence was that PW3, who was a childhood friend of the deceased, was called by one Minimah a/p Pakisamy to come to the house of the deceased. This Minimah was the sister-in-law of the deceased and she was working in the deceased's house. PW3 was the neighbour and C when he came over, he found the deceased on the floor of the toilet. The deceased was alive at the time. He was holding his head and complaining of pain. PW3 testified that he saw redness over the area of the head the deceased was holding. Soon after that, the deceased died.

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[21] A post-mortem was conducted on the deceased by Dr. Hon Mun Cheng. The post-mortem report was however signed by Dr. Mohd Yassin (DW1) who came forward to testify on behalf of the defendant. It appeared that DW1 prepared the report from the E notes of Dr. Hon. There were some notes which were offered to the court but DW1 was unable to say if it was Dr. Hon's notes. As a matter of fact, DW1 testified that he could not remember Dr. Hon at all.

F **[22]** Now, DW1 also prepared, at the request of the defendant, a physician's statement dated 22 October 1999. It turned out however and rather strangely that there were in fact two different statements dated 22 October 1999. The first one stated the cause of death as "intracerebral hemorrhage" and the other one stated G the cause of death as "intracerebral hemorrhage due to fall in the bathroom." Although DW1 testified that the first one was the correct statement, he was unable to explain the discrepancy in the two statements.

H **[23]** Apart from the physician's statements, there was also a letter dated 9 May 2000 where in a question posed by the defendant, DW1 stated that there were neither external injury, bruises nor haematoma noted on the body and that intracerebral hemorrhage or bleeding in the brain is due to spontaneous rupture of smaller blood vessel probably caused by underlying hypertension.

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[24] However, when confronted with some literature from Wikipedia, an online free encyclopedia, DW1 agreed that a hit to the head may also cause intracerebral bleeds. So in essence, intracerebral hemorrhage can be caused by underlying hypertension or by trauma to the head.

[25] So the question that arises is – could the deceased then have been suffering from hypertension? There was evidence from Dr. Kanaparajan (PW2) that he treated the deceased at his clinic for injuries sustained in a motor vehicle accident on 20 May 1999. He also testified that there was no abnormality in the blood pressure of the deceased and that the deceased was not suffering from any illness at that time. It is significant to note that this was about three months before his death.

[26] What is also significant is that the defendant themselves, as prudent insurers normally do, carried out their own investigation as to the health of the deceased prior to his death. One of the methods employed was to check with all the clinics in the area. Even after doing so, they found no medical record of the deceased suffering from any illness.

[27] It would therefore be safe to conclude that the deceased was not being treated for any illness at the time of his death. I think it would also be fair to say that if indeed the deceased was suffering from any illness, PW3, his childhood friend, would have known about it. And I am sure the defendant would also have been able to produce witnesses to prove that it was the case. The most impressive evidence in this regard remains that of DW2 who said quite emphatically that if the deceased had some illness or had hypertension, he would have certainly noted it in his report.

[28] Now the sum effect of the evidence leads me to think that it cannot have been hypertension which led to the intracerebral bleeding. To be fair to DW1, when he mentioned about hypertension being an underlying cause, he was only making a general statement. After all, he had never even met the deceased. For these reasons, I would rule out hypertension as the cause. That would leave brain trauma as the cause of his death.

[29] Now it was agreed and indeed it is the law, that the onus is on the plaintiff to show that the death of the deceased was due to a risk insured by the policy. In the context of the instant case, the onus was on the plaintiff to show that the deceased dies as a result of an accident (fall) and not as a result of any other cause

(see *Leong Luen Kiew & Anor v. The New Zealand Insurance Co. Ltd* [1939] 1 LNS 50; *Regina Fur Company Ltd v. Bossom* [1958] 2 Lloyd's Law Reports 425; *Watts v. Simmons* [1924] 18 LI LR 177; *Amanah Raya Bhd v. Jerneh Insurance Bhd* [2005] 2 CLJ 393 at 401).

[30] In the instant case, no one saw the deceased in the toilet before he died. That is not a mystery in itself. I think we can assume that the deceased wanted to be alone when he had to go to the toilet. Inferences would therefore have to be drawn from all the circumstantial evidence.

[31] To my mind, the testimony of PW3 coupled with the evidence which suggested that the deceased would not have been suffering from any illness or hypertension at the time of his death was more than sufficient to prove that the deceased must have had a fall which resulted in the intracranial hemorrhage.

[32] In coming to this view, I have not overlooked the evidence of the defendant with regard to the post-mortem report. In my view, the testimony of DW1, with respect, carries little weight or persuasive value except for his opinion on the general causes of intracranial bleeding. I say this, firstly, because DW1 was not the one who conducted the post-mortem. He was merely reproducing what someone else had done. That someone else was not before the court for his evidence to be tested, weighed and assessed accordingly. Secondly, there were discrepancies in his statements to the defendant for which no explanation has been forthcoming either by DW1 or someone else. I therefore considered the evidence of DW1 in this regard to be unreliable and unsafe for the court to act upon.

[33] For the reasons stated above, I considered that the plaintiff had discharged his burden on a balance of proving that the deceased died as a result of a fall which was an accident, a risk covered by all the policies.

Conclusion

[34] In the premises, and for the reason I have stated, the plaintiff's claim must be allowed. I therefore order that judgment be entered for the plaintiff against the defendant for the sum of RM430,000 with interest at 8% per annum from the date of the writ till realization. After hearing the parties, I assessed costs at RM20,000 to be paid to the plaintiff.